United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1150

B
Pgs

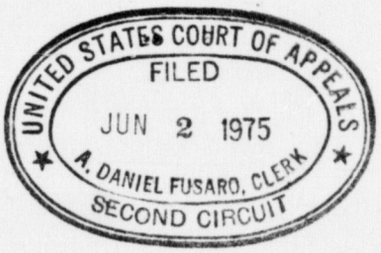
To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- WILLIAM CAPO, HOWARD KAYE, JAMES PARKER, and STUART STEINBERG, Appellants.	Docket No. 75-1150

BRIEF FOR APPELLANT
WILLIAM CAPO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
WILLIAM CAPO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- WILLIAM CAPO, HOWARD KAYE, JAMES PARKER, and STUART STEINBERG, Appellants.	Docket No. 75-1150

BRIEF FOR APPELLANT WILLIAM CAPO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether essential allegations in the application for the wiretap order were not only insufficient on their face, but also were contradicted by other evidence in the case, thereby requiring that the tapes be suppressed or that, at a minimum, a hearing be held to determine the truthfulness of the allegations in the affidavits.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment rendered after a jury trial in the United States District Court for the Southern District of New York (The Honorable Robert J. Ward) convicting appellant William Capo of conspiracy to possess and distribute Schedule I and II narcotic drugs and Schedule III controlled substances, in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(B) (Count One); and of three substantive counts of possession with intent to distribute the Schedule III controlled substance phencycladene hydrochloride (PCP), in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(B) (Counts Two, Three, and Four), and of using the telephone to commit and facilitate the conspiracy, in violation of 21 U.S.C. 6843(b) (Counts Nine and Ten). On March 18, 1975, appellant Capo was sentenced preliminarily to the maximum term of imprisonment and special parole subject to revision after a ninety-day observation and study conducted pursuant to 18 U.S.C. §4208(b).

After completion of the trial, The Legal Aid Society, Federal Defender Services Unit was assigned to represent appellant Capo on March 17, 1975, for sentencing before the District Court, and has been continued as counsel on appeal by order of this Court, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant William Capo was charged* along with ten** others with conspiracy to possess with intent to distribute Schedule I and II narcotic drugs and Schedule III controlled substances, in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(B) (Count One); he was also charged with three substantive counsts of distribution of the Schedule III controlled substance, phencycladene hydrochloride (PCP) on June 26, 1973 (Count Two), on June 27, 1973 (Count Three), and on July 10, 1973 (Count Four); and with two counts of using the telephone to commit and facilitate the conspiracy on July 31, 1973 (Count Nine) and August 6, 1973 (Count Ten).

A. Pre-Trial Proceedings

Prior to trial, the defense moved to suppress the tapes of telephone conversations obtained pursuant to a wiretap order issued on July 20, 1973, by The Honorable Charles E. Stewart,*** and as extended by order dated August 20, 1973,

---

*The indictment is "B" to appellant's separate appendix.

**Only three co-defendants -- Stuart Steinberg, Howard Kaye, and James Parker -- were tried with appellant Capo.

***The order and its accompanying application, including the affidavits of Assistant United States Attorney John P. Cooney Jr. and Drug Enforcement Administration Agent Brian Noone, are annexed as "D" to appellant Capo's separate appendix.

by The Honorable Inzer B. Wyatt. The order directed the interception of telephone conversations on two telephones, both registered to Stuart Steinberg at 135 East 35th Street, New York City. The motion to suppress the tapes challenged the legality of the order on the grounds, inter alia, that the application failed to set forth, as the statute (18 U.S.C. §§2518(1)(c) and (3)(c)) requires, a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried.

The affidavit of Assistant United States Attorney John Cooney, submitted in support of the application, provided, in pertinent part:

> (c) Normal investigative procedures have been tried and failed to [sic] and further normal procedures reasonably appear to be unlikely to succeed and are too dangerous to be used, if tried.
>
> Cooney Affidavit at 4.

The affidavit of Drug Enforcement Administration Agent Brian Moore, also submitted in support of the application, asserts, inter alia:

> 11. Normal investigative procedures have not succeeded in establishing the full extent of the activities conducted by Stuart L. Steinberg related to the purchase or sale of controlled substances, nor have the location and identity of the source of Stuart L. Steinberg's supply been established. Normal investigative procedures reasonably appear to be unlikely to succeed in obtaining the evidence necessary for the following

reasons:

> A. At this time there is no known undercover access to his supplier and no chance of developing such access because of the covert manner in which Stuart L. Steinberg operates; and
>
> B. My experience and the experience of other Special Agents of the Drug Enforcement Administration has shown that individuals dealing in large quantities of narcotics are particularly covert in their activities and wary of surveillance by Federal and State law enforcement personnel. Such dealers very rarely keep records, deal personally with a very few trusted individuals and isolate themselves from other individuals in the distribution organization.

Noone Affidavit at 7.

At oral argument on the motion, counsel for Stuart L. Steinberg requested that a hearing be held to resolve the question of whether the Government's generalized assertions of covert activity were true in light of the facts in the case which established that Steinberg operated in an open and guileless manner (A.19-23*). Counsel further argued that the allegation in the affidavit to the effect that other investigative techniques had been and would be unsuccessful, were ritualistic and conclusory and insufficient on their face to comply with the requirements of the statute (A.21-22, 26-27, 29). In response, Judge Ward commented:

---

*Numerals in parentheses preceded by "A" refer to pages of the transcript of the proceeding dated December 19, 1974, which has been docketed as part of the record on appeal.

> You are premising this, sir, on unlikely to succeed to lead to the apprehension of one defendant for one criminal act. It would seem to me that when you have a conspiracy, as is alleged here in this indictment, which involves a great many people and which involves, at least according to the indictment, activities which have been occurring in this District, and apparently, from what I have read in the papers here, elsewhere over an extended period of time, that your argument is undercut. Yes, you could perhaps make a case against one defendant on one charge or two charges, based on what I have seen here. But when you are attempting to investigate, prosecute, a group of people for a variety of criminal activities conducted in different places over a fairly extended period of time, you are telling me that, well, you can have surveillance, you can have undercover agents all over the place, would seem to me that that is not a very persuasive argument in the premises we have here.
>
> (A.20-21).

Addressing counsel's argument that there were no facts in this case to indicate that traditional methods of surveillance would have been unsuccessful at uncovering Steinberg's suppliers,* Judge Ward theorized:

---

*In point of fact, the complaint of Agent Ronald L. Jordison, dated September 18, 1973, and annexed to the record of the proceedings before the Magistrate against appellant Capo (Document #55, docketed as part of the record on appeal), indicates that surveillance conducted on July 10, 1973, and information from a "confidential informant" were available to the agents to enable discovery of the identity of persons who supplied Steinberg with PCP:

> The sources of deponent's information and the grounds of his belief are investigations conducted by him in the course of his official duties, including:

> Let's just turn to the other half of the coin. Let's assume for a moment that there was no surveillance because the agents were afraid of burning the thing up. Let's take that for a moment. Under the circumstances I have seen cases go out that way. People who are engaged in this activity are somewhat more wary, I trust, than others who engage in normal business activities. They are highly sensitive. Their antennae are extended. Under the circumstances it would seem to me that with all the trouble that agents have to go through to get these orders by coming into this Court, if there was a clear other route they would have taken it. Now, you are saying "Well, that is surmise." But everything you have told me up to this point is surmise. I consider that there is enough in this affidavit to satisfy the requirements of the statute....
>
> (A.33-34).

In a memorandum opinion dated December 27, 1974,* Judge Ward, without addressing counsel's request for a hearing, denied the motion to suppress the tapes of the intercepted telephone conversations, holding, in pertinent part:

(Footnote continued)

> (1) Surveillance of the defendants MICHAEL DURST and WILLIAM CAPO by Special Agents of the Drug Enforcement Administration as they entered and exited the above mentioned address on the above mentioned date; and
>
> (2) Information obtained from a reliable confidential informant that the package delivered by the defendants MICHAEL DURST and WILLIAM CAPO referred to above contained Phencycladine Hydrochloride (PCP).

*The opinion is "E" to appellant's separate appendix.

> Steinberg argues that the issuance of the wiretap order of July 20, 1973 was unjustified and that the facts submitted to the judge to whom the application for an order was made were inadequate. Defendant argues that in violation of 18 U.S.C. §§ 2518(1)c) and (3)(c), wiretapping was resorted to reflexively as the initial step in the government's investigation despite the availability and practicability of traditional investigative techniques. However, a review of the government's application belies this argument. The investigation had been in progress for almost a month, $11,200 in government funds had been expended to purchase approximately three-quarters of a pound of phenycyclidine hydrochloride ("PCP"), a controlled substance, from Steinberg, and his source or sources of the controlled substance remained undisclosed. While defendant argues that traditional investigative techniques would have sufficied, the fact is that they had not up to that point. This Court finds that the application substantially complied with the statutory requirement and the issuance of the July 20, 1973 order was proper. See U.S. v. Falcone, 364 F.Supp. 877, 889-890 (D.N.J. 1973).
>
> Memorandum Opinion at 2.

On January 17, 1975, at a subsequent pre-trial proceeding, counsel for Steinberg moved to renew the motion to suppress the wiretapped conversations (B.14*). This motion was based on newly discovered evidence which indicated that Agent Noone's assertions in his affidavit that he had no undercover access to Steinberg's supplier, were untrue. The evidence

---

*Numerals in parentheses preceded by "B" refer to pages of the transcript of the proceedings dated January 17, 1975, Document #88 to the record on appeal.

was a taped conversation in which Steinberg offered to introduce his suppliers to Noone but Noone declined the opportunity (B.14-15).

Judge Ward, finding that he had premised his earlier denial of the motion on more than one ground, again denied the motion (B.17).

B. The Trial

Drug Enforcement Administration Agents Brian Noone (56-131*) and Arthur Anderson (191-205) testified as to their meetings with Stuart Steinberg in June and July of 1973 in Steinberg's apartment at 135 East 35th Street. According to Noone, two other persons -- "Harry" and "Ricky" -- were present at his first meeting with Steinberg on June 26, 1973. Ricky's full name is Ricky Citrola (102), and the Government stipulated that as early as June 26, 1973, he was working as a government informant and that it was in that capacity that he introduced Agent Noone to Steinberg (401). In this first meeting and the two which followed on June 27, 1973, and July 10, 1973, the agents received a sample of phencycladine hydrochloride (PCP) (60), two ounces of PCP (66), and finally,

---

*Numerals in parentheses refer to pages of the transcript of the trial.

on July 10, 1973, eight ounces of PCP* (76). Also on July 10, the agents negotiated with Steinberg to purchase fifty pounds of the drug (81). This transaction, despite repeated negotiations with Steinberg (88-90), never came to fruition because Steinberg was unable to obtain the drug.**

Neither Noone nor Anderson could identify appellant Capo as anyone they had ever seen participating in the negotiations***(197a-199). Noone conceded, on cross-examination, that Steinberg had offered to introduce him to his supplier but that he had declined the opportunity****(125).

Over objection by all defense counsel (277-278), tapes of conversations intercepted during the wiretap on Steinberg's

---

*The drugs were admitted into evidence as Government Exhibits #4-B, #5-C, and #7-C, with a limiting instruction that they were introduced now only as against Steinberg (73).

**When it became apparent that Steinberg could not deliver the PCP, Moore suggested that Steinberg get him cocaine instead (90). This began a pattern in which when Steinberg failed to produce the cocaine, other drugs were suggested as substitutes. No further drug transactions between the agents and Steinberg were ever completed.

***Surveillance by other officers during the period drugs were to be delivered revealed that persons were observed entering the premises (125).

****Noone's gratuitous and unsubstantiated explanation that he chose not to meet Steinberg's source because he feared that to do so would risk his life (127) was contradicted by Noone's subsequent behavior. See infra at footnote at 12.

two telephones were played to the jury* (307-394). Of the approximately seventy-four conversations played by the Government, "Billy," whose voice was identified by Agent Noone as that of appellant Capo (228), participated in eight conversations (2I4, 1I2, 2K3, 1N8, 2O7, 1P7, 2Q5).

In the course of those conversations, Billy and Steinberg argued about who owed whom money for the prior delivery of the PCP (2I4). They also discussed their present inability to obtain the larger quantity of the drugs because of the arrest of the chemist who had been making the drug (2I4). Finally, they discussed the feasibility of tapping a new source Billy had in Chicago (1I2).

Also in the tapes introduced by the Government was a conversation (2D1) between Steinberg and Susan Weinblatt, a co-defendant whose trial was severed from the one conducted. In that conversation Steinberg describes his relationship to Ricky Citrola who, unbeknownst to Steinberg, was the informant for the Government. Steinberg tells Weinblatt that on

---

*The tape of each conversation was identified as to which of the two telephones it was transmitted on (1 or 2), followed by an alphabetical letter denoting the day on which the call was received, and then another number denoting which call it was on that particular day on that telephone. Transcripts of the tapes were admitted solely for the purpose of aiding the jurors while they listened to the tapes (269).

the night before when Noone was at his apartment,* Ricky telephoned him and spoke to both Noone and Steinberg (2D1 at 5). According to Steinberg, Ricky was his partner in all drug dealings (2DL at 9-10). In fact, when, on July 10, 1973, Steinberg negotiated the large PCP deal with Noone, assured Ricky that he (Steinberg) could supply that quantity, saying:

> Don't worry, Ricky. Your people [Noone and Anderson] like what they saw here. Did half a pound with me already, with Mickey and Billy.
>
> (2D1 at 12). Emphasis added.

After the Government rested (438) and motions for a judgment of acquittal had been made and denied (439-468), Howard Kaye and Stuart Steinberg presented their respective defenses (471-568; 570-640). During the course of Steinberg's defense, he played the tape of a conversation between Ricky, who was at Steinberg's apartment, and Agent Noone (1N7) (581). That conversation reveals that, indeed, Ricky was still functioning in his informant capacity for the Government:

(1) he described for Noone Steinberg's mental capacity (Id. at 1-2);

(2) he reported on who was in the apartment and

---

*Also in Steinberg's apartment along with Noone, who had apparently lost his fear of meeting Steinberg's suppliers, were David Steinberg, an unindicted co-defendant, and Stanley Nicastro, a co-defendant whose trial had been severed.

that a girl named Susan had left to pick up some pills (Id. at 2-3);

(3) he also revealed that he was doing other, and apparently successful, undercover work for Noone, with their "mutual friend," the "little man" (Id. at 4);

(4) he agreed to help Noone by getting Steinberg to telephone the man who was to go to Chicago for the PCP (Id. at 10); and

(5) he arranged to meet Noone later so that they could talk more freely (Id. at 7).*

No witnesses testified for appellant Capo. The Judge charged the jury** (831-832). After deliberations, the jury returned a verdict finding appellant Capo guilty on all counts (924).

---

*During this same telephone call when Steinberg spoke to Noone, he reiterated that he and Ricky were partners, saying "I mean Ricky and I are one" and that, when Steinberg was away, Noone could deal with Ricky (Id. at 10).

**The charge is "C" to appellant's separate appendix.

STATUTORY PROVISION INVOLVED

18 U.S.C. §2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

...

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

...

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that --

(c) normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous; ...

ARGUMENT

ESSENTIAL ALLEGATIONS IN THE APPLICATION FOR THE WIRETAP ORDER WERE NOT ONLY INSUFFICIENT ON THEIR FACE, BUT ALSO WERE CONTRADICTED BY OTHER EVIDENCE IN THE CASE, THEREBY REQUIRING THAT THE TAPES BE SUPPRESSED OR THAT, AT A MINIMUM, THE CASE BE REMANDED FOR A HEARING TO DETERMINE THE TRUTHFULNESS OF THE ALLEGATIONS.

A. Introduction

Suppression of the evidence is the remedy to protect against the use of conversations intercepted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§2510-2520; United States Constitution, Amendment Four; 18 U.S.C. §2518(10)(a); United States v. Giordano, 416 U.S. 505, 524 (1974).

> ... We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.
>
> Id., 416 U.S. at 427.

Prior to trial defense counsel* moved to suppress the tapes of conversations intercepted on Stuart Steinberg's two

---

*When the tapes were introduced at trial, all counsel joined in the objection to their admission on the grounds specified in the pre-trial motions (478).

telephones on the ground, inter alia, that the affidavits in support of the application for the wiretap did not comply with the statutory provisions of 18 U.S.C. §§2518(1)(c) and (3)(c).

18 U.S.C. §2518(1)(c) provides:

> Each application for an order authorizing or approving the interception of a wire or oral communication shall ... include ...
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous....

The purpose of this provision, as the Supreme Court noted in United States v. Kahn, 415 U.S. 143, 153 n.12 (1974), is to "... assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." This Court, recognizing that use of wiretaps is to be restricted, has held that before the tap can be justified a judge must make an independent determination, based on the facts in each particular case, that other methods of investigation are not practicable. United States v. Tortorello, 480 F.2d 764, 774 (2d Cir. 1973); 18 U.S.C. §2518(3)(c).

In this case the Government failed to comply with the requirements which would ensure these protective measures. The application for the wiretap did not set forth a full and complete statement of tried but unsuccessful alternate in-

vestigative procedures or facts indicating why their future application would fail. Instead, the Government sought to rely on mere conclusory allegations of the unavailability of other methods. Further, the error was compounded by the fact that these conclusory assertions appear to contain misrepresentations of the status of the investigation at the time of the wiretap application. As a result, the judge who granted the order for the wiretap could not have made, as required by 18 U.S.C. §2518(3)(c), an independent and accurate evaluation of the real need to resort to electronic surveillance. United States v. Tortorello, supra, 380 F.2d at 774. The denial of the motion to suppress cannot stand.

B. The ritualistic incantations of the failure of "normal investigative procedures" in both the Cooney and the Noone affidavits are insufficient on their face to comply with the statutory requirements.

The Government's application for the wiretaps was supported by the sworn statements of an Assistant United States Attorney and a Drug Enforcement Administration agent assigned to the case. The affidavit of Assistant United States Attorney John P. Cooney Jr. does no more than to track, verbatim, the language of 18 U.S.C. §2518(1)(c). While Agent Noone's affidavit is physically longer, the additional words he uses

provide no more enlightenment as to what investigative procedures had failed in the past or why they were unlikely to succeed in the future than did Cooney's affidavit parroting the statute.* For example, Noone states, in a conclusory fashion, that "normal investigative procedures" have not established the full extent of Steinberg's activities. Further, Noone asserts that the same procedures -- whatever they were -- were unlikely to succeed in the future because of the "covert manner" in which Steinberg operated. In an apparent attempt to bolster this unsupported allegation of covert activity, Noone then described not Steinberg's operation, but rather the "typical" behavior patterns of individuals dealing in large quantitites of narcotics.**

Nowhere in either affidavit is there any enumeration of what "normal" investigative techniques had been unsuccessfully tried. There is no accounting of funds spent, other than those used for the purchase of drugs; nor is there any indication that during the three weeks of investigation the agent did any more than meet with Steinberg three times and telephone him occasionally.

---

*Both affidavits are part of Judge Stewart's July 20, 1973, order, annexed as "D" to appellant's separate appendix.

**Conveniently overlooked by the agent is the fact that Steinberg, to Noone's knowledge, was not dealing in a narcotic drug substance, but rather ir a Schedule III controlled substance, PCP.

Further, the affidavits contain no discussion of any attempt to use traditional methods of surveillance of both Steinberg and his apartment. Compare United States v. James, 494 F.2d 1007, 1014-1016 (D.C. Cir. 1974); United States v. Leta, 332 F.Supp. 1357, 1362 (M.D.Pa. 1971). It is significant that that procedure was likely to prove fruitful here since, according to Noone's affidavit, his dealings with Steinberg on July 10, 1973, virtually pinpointed the time when the supplier, drugs in hand, was scheduled to arrive at Steinberg's apartment. Also absent from the affidavits is any mention of the use of an informant to gain access to Steinberg's sources and customers (compare United States v. O'Neill, 497 F.2d 1020, 1025 (6th Cir. 1974); United States v. Leta, supra, 332 F.Supp. at 1362) despite acknowledgment in Noone's affidavit (at 7) that his initial introduction to Steinberg was through an informant for the Government.

Finally, there is absolutely no explanation of Noone's generalized assertion of covert operations. Ironically, what facts there are in the affidavit establish the contrary. Noone's recitation of events reveals that Steinberg used his real name, met the agent in his own home, telephoned his suppliers in the agent's presence, and was willing, at Noone's suggestion, to meet "Noone's people." There are simply no facts in the affidavit to warrant the conclusion that Steinberg would not have similarly complied had Noone suggested that he meet Steinberg's "people."

The critical fact here is that the Government's application for the wiretap provides absolutely no insight as to the availability of other investigative procedures. Because no statements appear in the affidavits, whether or not the Government may have tried unsuccessfully to use visual surveillance or informant information is not at issue here.* Similarly, whether or not the Government may have made a valid investigative decision not to use informants and not to inquire directly of Steinberg about the identity of his suppliers does not affect the issue of sufficiency of the affidavits. The affidavits are simply devoid of the essential facts from which a "neutral and detached" judge could draw the required inference that normal investigative procedures were not practicable. 18 U.S.C. §2518(3)(c); Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 111-113 (1964); Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. O'Neill, supra, 497 F.2d at 1025; United States v. Tortorello, supra, 480 F.2d at 774.

Demonstrative of the affidavits' failure to meet the statutory mandate of specificity is Judge Ward's apparent inability to cull from the Government's application any tangible evidence of "tried and failed" procedures. Consequently, at oral argument on the motion to suppress, the Judge was forced to hypothesize, without any basis in fact, that the reason

---

*But see infra, subdivision C at 25-27.

the agents failed to attempt normal investigative methods was that they feared that to do so would jeopardize the investigation.* Then, in a fine example of inverted logic, the Judge created a presumption of compliance with the statute by asserting:

> Under the circumstances it would seem to me that with all the trouble that the agents have to go through to get these orders by coming into this Court, if there was a clear other route they would have taken it.
>
> (A.33).

The memorandum opinion** denies the motion to suppress, again without addressing the issue of whether the affidavits had met the factual requirements of the statute, and thus whether the orders had been properly issued, on the following rationale:

> The investigation had been in progress for almost a month[***], $11,200 in government funds had been expended to purchase approximately three quarters of a pound of phenyclidene hydrochloride (PCP), a controlled substance, from Steinberg, and his source

---

*The Judge also indicated his willingness, despite the specific language of §2518(1)(c), to carve out an automatic exception for conspiracy cases. Judge Ward expressed his belief that, as a matter of law, normal investigative procedures are inadequate in a conspiracy case (A.20-21).

**The memorandum opinion is "E" to appellant's separate appendix.

***Actually, at the time of the application the investigation had been in progress for three weeks, from June 26, 1973, until July 18, 1973.

> or sources of controlled substances remained undisclosed. While defendant argues that traditional investigative techniques would have sufficed, the fact is that they had not up to that point.
>
> Memorandum opinion at 2. Emphasis added.

There being no factual support in the affidavits, the Judge was obviously forced to conclude, in a bootstrap fashion, that the Government's inability to ascertain the names of Steinberg's suppliers establishes that traditional investigative techniques had failed. This reasoning, of course, misses the mark. The point is that it may have been the Government's failure to utilize "normal investigative procedures" that resulted in the stymied investigation. Because the affidavits in support of the application for the wiretap order are completely devoid of facts upon which a judge could independently determine (1) the unavailability of other investigative procedures and (2) the consequent need for resorting to electronic surveillance, the order was improperly granted. 18 U.S.C. §§2518(1)(c), (3)(c). The tapes must be suppressed.

C. Even if the affidavits had been sufficient, the facts of this case required a hearing to determine whether the essential allegations in the affidavits were truthful.

It is a rule in this Circuit that, "upon a showing of falsehood or other imposition" on a judicial officer, a defendant is entitled to challenge the reliability of the affidavit upon which an order issues. United States v. Dunnings, 425 F.2d 836, 839-840 (2d Cir. 1969); United States v. Ramos, 380 F.2d 717, 726 (2d Cir. 1967); United States v. Freeman, 358 F.2d 459, 463 n.4 (2d Cir.), cert. denied, 385 U.S. 882 (1966); United States v. Halsey, 257 F.Supp. 1002, 1005-1006 (S.D.N.Y. 1966) (Frankel, J.); see also United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. en banc 1973). Such hearings are frequently held. United States v. Ruggendorf, 376 U.S. 528. 531-532 (1964); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973); United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973); United States v. Harwood, 470 F.2d 332 (10th Cir. 1972); United States v. Sultan, 463 F.2d 1066, 1070 (2d Cir. 1972); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971); United States v. Roth, 391 F.2d 507, 509 (7th Cir. 1967); United States v. Ramos, supra, 380 F.2d 717; United States v. Gillette, 383 F.2d 843, 847 (2d Cir. 1967); Jackson v. United States, 336 F.2d 579, 586 (D.C. Cir. 1964); King v. United States, 282 F.2d 398 (4th

Cir. 1960); United States v. Pearce, 275 F.2d 318, 321-322 (7th Cir. 1960).

Clearly the right to a hearing exists upon a challenge to the veracity of affidavits supporting an application for a wiretap order. United States v. James, supra, 494 F.2d at 1014; United States v. Falcone, supra, 364 F.Supp. 877. Judge Ward's denial of the motion to suppress the tapes without first holding the hearing requested by counsel requires reversal.

Counsel argued at the outset of his motion to suppress that a hearing was necessary to resolve the "discrepancy" between the specific facts in Noone's affidavit which established Steinberg's open dealings with the agents and Noone's conclusory and conflicting allegations of "covert" activity. Moreover, after the motion had been denied, counsel sought to renew his motion on the ground that Noone's assertion in the affidavit that he had no undercover access to Steinberg's supplier was squarely contradicted by a tape-recorded conversation in which Steinberg specifically offered to introduce Noone to his sources.

Despite this showing of misrepresentation in the affidavit, the Judge denied the motion to renew, again without a hearing. This decision was based on Judge Ward's mistaken belief that there had been several other grounds upon which he had found Noone's affidavit to be sufficient. However, the memorandum opinion, at 2, reveals that, to the contrary,

the sole reason for denying the motion was the agent's conclusory assertion that, to date, he had no undercover access to Steinberg's sources.

Moreover, appellant's right to a hearing on the motion to suppress is further required to determine whether the misrepresentation in the affidavit was intentional. Appellant is entitled to suppression of the tapes if the agent's misrepresentations, regardless of materiality, were intentional. United States v. Carmichael, supra, 489 F.2d at 988-989; Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv.L.R. 825 (1971).

Had a hearing been held, it is likely that appellant Capo would have been able to show that the misrepresentations which abound in the affidavit were both intentional and material. The affidavit asserts that undercover access to Steinberg's suppliers was unavailable; to the contrary, however, the evidence reveals that the agents had access to potentially endless information from Ricky Citrola.* Ricky was the government informant who introduced Noone to Steinberg. While the affidavit reflects this introduction by an informant, it is silent about the true nature and extent of Ricky Citrola's relationship with the Government. Ricky was aware of Noone's true identity, and knowingly sought to assist him in this and

---

*Further, Steinberg had made a personal offer to introduce Noone to his suppliers.

another investigation involving "our mutual friend," the "little man" (1N7, at 4). Ricky further aided Noone by reporting to him about other persons present in Steinberg's apartment and involved in the operation. He agreed to help Noone by getting Steinberg to telephone the man he was to send to Chicago for the PCP, and he also agreed to meet Noone in order to discuss further cooperation.

That Ricky Citrola had access to the same information allegedly requiring the wiretaps is beyond doubt. Steinberg repeatedly referred to Ricky as "his partner," the man with whom "he does everything." DUring a conversation with Susan Weinblatt (2I1), Steinberg indicates that Ricky knew from the start that the PCP came from "Mickey and Billy" (2I1). In any event, as Steinberg assured Noone (1N7), Ricky was in a position to meet all of Steinberg's sources since he was the one to whom Steinberg would entrust his business when he went on vacation.

The affidavit is also silent about the use of visual surveillance. In contrast, the record indicates that successful visual surveillance was conducted. The sworn statement of Agent Jordison reveals that, on July 10, 1973, he observed appellant Capo enter Steinberg's apartment carrying a package which a "confidential informant"* assured him was PCP.

---

*It is not known at this time whether this informant was Ricky or still another yet undisclosed.

Clearly, if surveillance on one day was so successful, it is likely that further visual observation would have produced, or in fact did produce, additional information to obviate the need for the wiretap. The denial of the motion to suppress cannot be upheld without a hearing to resolve these issues.

II

APPELLANT CAPO ADOPTS THOSE ARGUMENTS OF CO-APPELLANTS WHICH ARE APPLICABLE TO HIS CASE.

CONCLUSION

For the foregoing reasons, appellant Capo's conviction should be reversed, the wiretaps ordered suppressed, and the case remanded for a new trial; alternatively, the case must be remanded for a hearing on the motion to suppress the wiretaps.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
WILLIAM CAPO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

June 2, 1975

CERTIFICATE OF SERVICE

June 2, 1975

I certify that a copy of this brief and appendix for appellant William Capo has been mailed to each of the following:

The Honorable Paul J. Curran
United States Attorney
Southern District of New York
United States Court House Annex
One St. Andrew's Plaza
New York, New York 10007

Litman, Friedman & Kaufman, Esqs.,
Attorneys for Appellant Kaye
120 Broadway, Suite 118
New York, New York 10005

Siegel & Gaber, Esqs.,
Attorneys for Appellant Parker
401 Broadway
New York, New York 10013

Stanley Arkin, Esq.,
Attorney for Appellant Steinberg
300 Madison Avenue
New York, New York 10017

Sheila Gaber